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In the Supreme Court of the United States

OCTOBER TERM, 1997

RESURE, INC.
Plaintiff-Respondent

versus

CHEMICAL DISTRIBUTORS, INC.
Defendant-Petitioner

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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46 pp

QUESTIONS PRESENTED FOR REVIEW

In this insurance coverage dispute, general liability insurer, Resure Inc., moved the District Court for summary judgment discharging its defense and indemnity obligation to its insured, Chemical Distributors,Inc., for claims arising from a tank truck explosion. The involved tank truck was not owned or operated by the insured, was not on the insured's premises, nor in the service of the insured at the time of the explosion. The insurer asserted that coverage for claims arising from the explosion is excluded by the "Absolute Pollution Exclusion" endorsement of the policy. However, the law of the State of New Mexico, applicable to interpretation of the policy, requires consideration of the reasonable expectations of the insured when interpreting the extent and effect of exclusionary clauses.

The District Court, granting summary judgment, explicity held "the doctrine of resonable expectations plays no part in interpreting the pollution exclusion clause at issue," since "it probably has little application in the business insurance context." The District Court additionally noted, "even if it is appropriate to apply the doctrine in certain business settings, it should not be applied here, since ... the President and Chief Executive Office [sic] ... personally participated in procuring the policy ...."

The issues presented for review are:

1. Whether the District Court properly dismissed and omitted application of the doctrine of reasonable expectations in considering and interpreting the policy exclusion;

2. Whether the District Court properly crafted limitations upon application of the doctrine of reasonable

expectations, where none exist in the clear and unambiguous pronouncement of the applicable state's law;

3. Whether, on considering summary judgment, it was proper for the District Court to concoct and draw factual inferences regarding the relative sophistication of the insured's representatives and other matters, against the interest, of the non-movant.

LIST OF PARTIES AND PERSONS

Petitioner lists the following parties to the proceedings below:

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TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW.....i

LIST OF PARTIES AND PERSONS.....iii

TABLE OF CONTENTS.....v

TABLE OF AUTHORITIES.....vii

REFERENCE TO OFFICIAL/UNOFFICIAL REPORTS.....ix

STATEMENT OF JURISDICTION.....x

STATEMENT OF THE CASE.....1

ARGUMENT.....7

I. THE DISTRICT COURT DISMISSED THE LAW OF NEW MEXICO, AND ERRONEOUSLY CRAFTED *PROBABLE* LIMITATIONS UPON APPLICATION OF THAT LAW.....7

II. THE DISTRICT COURT IMPROPERLY DREW FACTUAL INFERENCES AGAINST THE NON-MOVANT, CDI.....12

CONCLUSION.....16

CERTIFICATE OF SERVICE.....17

TABLE OF CONTENTS (continued)

Page

APPENDIX

1. Appendix A
JUDGMENT dated June 26, 1996, granting plaintiff-respondent's Motion for Summary Judgment.....A-1

2. Appendix-B
RULING ON PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT dated May 31, 1996....A-15

3, Appendix-C
RULING of the United States Court of Appeals for the Fifth Circuit, AFFIRMING Judgment of the District Court, entered May 8, 1997.....A-14

4. Appendix-D
RULING of the United States Court of Appeals for the Fifth Circuit, DENYING Petition for Rehearing, entered September 23, 1997.....A-15

5. Appendix-E
ENDORSEMENT #3, ABSOLUTE POLLUTION EXCLUSION, excerpted from Resure, Inc. Policy No. DOL. 177523.....A-16

6. Appendix-F
AFFIDAVIT of Jerry Wood, dated December 26, 1995.....-17

TABLE OF AUTHORITIES

Cases: **Page**

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).....13.14

Barth v. Coleman, 118 N.M. 1, 878 P.2d 319 323 (1994).....7,8,9,10

Celotex Corp. v. Catrett, 477 U.S. 317, 325, 106 S. Ct. 2548, 2554, 91 L.Ed.2d 265 (1986).....13

Collister v. Nation Wide Life Ins. Co., 479 Pa. 579, 388 A.2d 1346, 1354 (1978) *cert. denied*, 439 U.S. 1089, 99 S. Ct. 871, 59 L.Ed.2d 55 (1979).....7,8

INA Life Ins. Co. v. Brundin, 522 P.2d 236, 242 (Alaska 1975).....7

Jimenez v . Foundation Reserve Ins. Co., 107 N.M. 322, 324-25, 757 P.2d 792, 794-95 (1988).....7

Knowles v. United Servs. Auto. Ass'n, 113 N.M. 703, 705, 832 P.2d 394, 396 (1992).....7,13

Morton International Inc. V. General Accident Insurance Co. of America, 134 N.J. 1, 629 A.2d 831 (N.J. 1993).....11

Red Panther Chemical Company v. Insurance Company of the State of Pennsylvania, 43 F.3d 514, 518 (10th Cir. 1994).....12

TABLE OF AUTHORITIES (continued)

Cases: **Page**

South Central Bell Telephone Co. V. Ka-Jon Food Stores, 644 So.2d 357, *vacated and remanded on other grounds*, 644 So.2d 368 (1994).....11

Statutes, Rules and Other Materials:

28 U.S.C. § 1254.....x

28 U.S.C. § 1291.....6

Federal Rules of Appellate Procedure, Rule 3.....6

Federal Rules of Civil Procedure 56(c).....13

Rules of the Supreme Court of the United States, Rule 10.....x

REFERENCE TO OFFICIAL/ UNOFFICIAL REPORTS

The opinions and decisions delivered by the lower courts in the present case have not been published in any official or unofficial report.

STATEMENT OF JURISDICTION

This Honorable Court has jurisdiction over this Petition pursuant to the Rules of the Supreme Court of the United States, Rule 10, and 28 U.S.C. §1254. A final judgment was rendered by the United States District Court for the Middle District of Louisiana on June 26, 1996, against defendant-petitioner, Chemical Distributors, Inc., and in favor of plaintiff-respondent, Resure, Inc., discharging Resure, Inc.'s obligation to defend and indemnify Chemical Distributors, Inc., under a policy of insurance issued to Chemical Distributors, Inc., and further awarding reimbursement of prior defense expenditures to Resure, Inc. Said judgment was affirmed on appeal to the United States Court of Appeals for the Fifth Circuit in judgment rendered and entered May 8, 1997. Chemical Distributors, Inc.'s subsequent Petition for Rehearing was denied in judgment rendered and entered September 23, 1997.

STATEMENT OF THE CASE

Chemical Distributors, Inc. ("CDI") is a company principally engaged in the re-packaging, blending and distribution of bulk chemical products purchased from chemical manufacturing concerns. At all times relevant (and at present), the company owned and operated a re-packaging and distribution facility located in Port Allen, Louisiana.

In connection with these pursuits, CDI contracted the services of Safeway Transportation, Inc. ("Safeway"), a motor carrier and hauling contractor licensed by the State of Louisiana, to haul chemical commodities. Pursuant to Uniform Hauling Contract entered between Safeway and CDI, Safeway hauled and delivered chemical products to CDI's Port Allen facility, utilizing tractors and tank trailers owned or leased by Safeway, and operated by drivers in the employ of Safeway.

The loss which underlies this insurance coverage dispute arises from the explosion of a tank truck leased to Safeway by TMI Industries, Inc. ("TMI"). Significantly, **the explosion of the tank truck occurred NOT while the tank truck or Safeway was performing services for CDI, NOR on the premises of CDI,** but during the course of work Safeway was performing for another of its customers, Uniroyal Chemical Company, Inc. (hereinafter "Uniroyal"). The tank truck exploded while temporarily parked at TMI's holding facility in Port Allen. CDI's alleged liability was predicated on the fact that the tank truck which exploded had, two days prior to the explosion, been utilized by Safeway in delivering the chemical product, sodium bisulfite, to CDI's Port Allen facility.

The explosion of the tank truck on July 16, 1993

caused multiple personal injuries and property losses to persons and facilities in the vicinity of the explosion, all flowing from the concussive impact of the explosion itself and the release of the contents of the tank truck. An emergency environmental response, or clean-up, of the affected area was immediately undertaken by Uniroyal. Uniroyal thereafter filed suit against the manufacturers of the chemical product in shipment, Deltech Corporation ("Deltech"), against its carrier and transportation broker, U.S. Comex Corporation, against carrier, Safeway, and against the tank truck owner, TMI, seeking reimbursement of and/or contribution toward costs Uniroyal incurred as a result of the explosion.

Safeway filed a third-party demand in that action against CDI, alleging entitlement to indemnification from and/or contribution toward any amounts which Safeway might ultimately be cast liable on the main demand. The allegations of Safeway's third-party demand against CDI comprise, in their entirety, the following:

IV.

> Third-party plaintiff has denied any and all liability unto plaintiff for damages allegedly sustained in the principal action, and further, third-party plaintiff avers that any damages suffered by plaintiff were caused by the negligence, strict liability and/or other legal fault of third-party defendants, CHEMICAL DISTRIBUTORS, INC. and COASTAL TERMINAL SYSTEMS "LA", INC.

V.

> Third-party plaintiff avers that should plaintiff be determined to have sustained damages as

alleged, which is at all times denied, said damages which flow therefrom were not caused nor contributed by any negligence, fault, want of due care, strict liability or breach of any duty or obligation alleged to have been owed by third-party plaintiff, but rather, such was caused by the fault, negligence, want of due care, strict liability, and/or breach of responsibilities and obligations owed by third-party defendants, CHEMICAL DISTRIBUTORS, INC. and COASTAL TERMINAL SYSTEMS "LA", INC.

VI.

In the event third party plaintiff is held liable or responsible unto plaintiff with respect to the principal demand, which is at all times denied, third-party plaintiff is entitled to complete indemnity for any and all sums paid or collected, together with reasonable attorney's fees and all costs of defense from third-party defendants herein, CHEMICAL DISTRIBUTORS, INC. and COASTAL TERMINAL SYSTEMS "LA", INC., for any negligence, fault, want of due care, strict liability of breach of any obligations or duties owed by third-party plaintiff unto original plaintiff, being merely passive, secondary and technical, and that of third-party defendant is primary, active and real.

VII.

Further, in the alternative, third-party plaintiff alleges that the negligence, fault, want of due care, strict liability or breach of any obligations or duties owed by third-party defendants herein,

> CHEMICAL DISTRIBUTORS, INC. and COASTAL TERMINAL SYSTEMS "LA", INC., constituted a contributory proximate cause of the alleged accident and damages at issue, and accordingly, SAFEWAY as third-party plaintiff is entitled to contribution or apportionment of damages commensurate with the degree of responsibility of the various contributing parties.

Safeway's third-party demand is silent as regards the specific duties or obligations allegedly breached by CDI.

Subsequent to the filing of Uniroyal's lawsuit, two personal injury lawsuits were filed on behalf of three claimants, Edward Buggage, Scott McCants and Saul Kimble. Buggage and McCants leveled allegations of fault, indiscriminately, against multiple defendants, including Uniroyal, Safeway, TMI, Deltech and CDI. Kimble alleged fault and liability in CDI in a single allegation, as follows:

> 18.
>
> C.D.I. Inc., upon information and belief, was required to properly clean the tanker to prepare same for the receipt of the chemicals herein named which ultimately exploded.

Thus, the allegations of fault and liability on the part of CDI in the underlying proceedings posit CDI's alleged failure to completely remove all residue of sodium bisulfite, which Safeway had delivered to CDI's Port Allen facility on July 14, 1993, from the tank truck which subsequently exploded on July 16, 1993. CDI vehemently denied this allegation, noting that Safeway was contractually obligated to

clean-out its tank trucks following completion of hauling assignments on behalf of CDI. Ultimately, during the pendency of the present coverage proceeding, CDI was dismissed and exonerated on motion for summary judgment granted in the Uniroyal matter.

At all times relevant, CDI was insured by Resure, Inc. ("Resure") pursuant to a policy of comprehensive general liability insurance, Policy No. DOL-177523. Though undertaking CDI's defense in the third-party action and in the subsequent personal injury suits, Resure issued a reservation of rights on or about September 9, 1994, setting forth multiple coverage defenses under the applicable policy, including its assertion that coverage for the third-party demand asserted by Safeway and the personal injury claims of Buggage, McCants and Kimble, is excluded pursuant to the "Absolute Pollution Exclusion" endorsement of the policy.

Resure initiated the present proceeding, filing Complaint for Declaratory Judgment against CDI, requesting judgment discharging its obligation to defend and indemnify CDI in connection with claims arising out of the tank truck explosion, and additionally requesting reimbursement of expenses incurred on behalf of CDI in defending these claims. In its Complaint, Resure outlined and asserted several defenses to coverage under the terms of the Policy issued to CDI, allegedly negating in the first instance or otherwise excluding coverage for claims arising from the explosion.

Resure subsequently filed a Motion for Summary Judgment seeking summary disposition of one of the defenses to coverage asserted in its Complaint. Specifically, Resure requested a summary determination that the "Absolute Pollution Exclusion" of the Policy (Appendix No. 5) unambiguously applied to the claims arising from the July 16, 1993 incident,

excluded coverage for all such claims and that, therefore, Resure was not obligated to defend CDI of and from such claims. In addition, Resure again sought reimbursement of expenditures incurred on behalf of CDI in defending personal injury and property damage lawsuits arising from the incident. The Honorable John V. Parker, Judge, United States District Court for the Middle District of Louisiana, decided Resure's Motion for Summary Judgment on briefs, without oral argument, issuing his Ruling on Plaintiff's Motion for Summary Judgment on May 31, 1996. (Appendix No. 2.) Judgment pruportedly conforming to Judge Parker's Ruling was entered June 26, 1996. (Appendix No. 1.)

Appeal of the District Court's ruling was taken to the United States Court of Appeal for the Fifth Circuit, pursuant to Federal Rules of Appellate Procedure, Rule 3, and 28 U.S.C. § 1291. The Judgment was affirmed on appeal, in a *per curium* ruling entered May 8, 1997. (Appendix No. 3.) CDI's subsequent request for rehearing, including a request for the assignment of written reasons, was denied in ruling entered September 23, 1997. (Appendix No. 4.)

CDI respectfully requests review of the District Court's explicit refusal to consider CDI's "reasonable expectations" when interpreting the policy, as is required by the interpretive rules prescribed by the law of New Mexico (applicable to the policy at issue). CDI further requests review of the District Court's crafting of limitations upon application of the doctrine of reasonable expectations, which is nowhere supported by the law of New Mexico. Finally, CDI requests review of the propriety of the District Court's concoction of factual inferences, all of which were construed against CDI, the non-movant, and all in derogation of proper procedure on consideration of motion for summary judgment.

ARGUMENT

1. THE DISTRICT COURT DISMISSED THE LAW OF NEW MEXICO, AND ERRONEOUSLY CRAFTED *PROBABLE* LIMITATIONS UPON APPLICATION OF THAT LAW

The law of New Mexico with respect to the interpretation of insurance policies and the application of exclusionary clauses is set forth by the Supreme Court of New Mexico in *Barth v. Coleman*, 118 N.M. 1, 878 P.2d 319, 323 (1994), as follows:

> When deciding whether an exclusionary clause is effective to nullify coverage under an insurance policy, **we give consideration to the reasonable expectations of the insured,** *Knowles v. United Servs. Auto. Ass'n*, 113 N.M. 703, 705, 832 P.2d 394, 396 (1992); *Jimenez v. Foundation Reserve Ins. Co.*, 107 N.M. 322, 324-25, 757 P.2d 792, 794-95 (1988). ...
>
> The doctrine of reasonable expectations is not restricted to those cases in which the policy language is at issue. *See INA Life Ins. Co. v. Brundin*, 522 P.2d 236, 242 (Alaska 1975) (noting that "[a] lay person's expectations of insurance coverage are of course formed by many factors besides the language of the policies themselves"). Often, the dynamics of the insurance transaction, and not the language of the contract itself, determine what the reasonable expectations of the insured are. *See Collister v. Nation Wide Life Ins. Co.*, 479 Pa. 579,

> 388 A.2d 1346, 1354 (1978), *cert. denied*, 439 U.S. 1089, 99 S. Ct. 871, 59 L.Ed.2d 55 (1979), *see also Brundin*, 533 P.2d at 242 (concluding that an insured's expectations were at least partially generated by printed advertising flyers describing coverage). **Accordingly, courts must "examine the dynamics of the insurance transaction to ascertain what are the reasonable expectations of the consumer."** *Collister*, 388 A.2d at 1354.

Barth, 878 P.2d at 323 (emphasis ours).

Without any reference, whatsoever, to competing or supervening authority, the District Court rejected the clear and explicit directive of *Barth*, stating:

> The Court finds that the doctrine of reasonable expectations *plays no part* in interpreting the pollution exclusion clause at issue. The doctrine is intended to protect unsophisticated laymen, and hence it *probably* has little application in the business insurance context.

(Appendix No. 2, (emphasis ours).) Was the District Court correct to ignore and dismiss the unambiguous directive of the Supreme Court of New Mexico - because it *probably* has little application in the business context. **There is simply NO New Mexico authority for this proposition**; moreover, the cited case, *Barth*, itself involves business insurance!

The District Court, again without authority, likewise dismissed and ignored the directive that a court considering

an exclusionary clause, must consider the reasonable expectations of the insured by examining "the dynamics of the insurance transaction." *Barth*, 878 P.2d at 323. The District Court did not and could not consider the dynamics of the insurance transaction" simply because no record of that transaction was placed before the Court by the moving party, Resure. CDI submits that its rights under the Resure policy-specifically, whether an exclusion designed to withdraw coverage for industrial pollution applies to the tank truck explosion-must be examined in the manner prescribed by the law of New Mexico.

In this regard, the *Barth* decision is factually instructive as well. The coverage issue in *Barth* involved the interpretation and application of an assault and battery exclusion contained within a bar owner's liability policy. The underlying claim arose from a barroom fist-fight between two patrons, with the liability of the bar owner predicated upon his failure to control and prevent escalation of the altercation, which resulted in the fight and the plaintiff's injuries. The assault and battery exclusion, not unlike the exclusion at issue here, appeared by its terms to wholly negate coverage for the incident and specifically provided as follows:

> [T]he insurance does not apply to bodily injury or property damage arising out of assault and battery or out of any act or omission in connection with the prevention or suppression of such acts, whether caused by or at the instigation or direction of the insured, his employees, patrons or any other person.

Barth, 878 P.2d at 322-23. After re-stating the law of New Mexico relative to the interpretation of exclusionary clauses (excerpted above), the court went on to note:

> In this case, there is no ambiguity caused by the language of the policy itself. The policy clearly excluded coverage for assault and battery. Barth's damages resulted from an assault and battery. Under the literal terms of the policy, Barth's damages would not be covered. This analysis of the policy language does not, however, end our inquiry.

Barth, 878 P.2d at 323 (emphasis ours). Pursuant to the foregoing, the District Court's conclusion that the policy was not, on its face, ambiguous, should not have concluded its inquiry.

The *Barth* court went on to find, upon examining the "dynamics of the insurance transaction," that the policyholder was not sufficiently informed about the nature of the coverage he was purchasing, nor how the policy was being procured, nor from what company he was purchasing the policy. Moreover, the court found that the policyholder had no notice that the policy contained an assault and battery exclusion prior to the barroom fight, and credited his testimony that he had specifically communicated to his insurance brokers that he needed insurance to cover altercations between the bar's patrons. The court ultimately concluded-only after considering evidence regarding the transaction-that the insurance transaction gave rise to a reasonable expectation that the policy would conform to the coverage requested, and held that the policy covered plaintiff's damages, notwithstanding the assault and battery exclusion.

Resure presented no evidence, whatsoever, regarding

the "dynamics of the insurance transaction" which produced the policy at issue in this case. This is no doubt due to the fact that there were multiple intermediaries involved in the transaction which produced the policy at issue, including, at least, Bederra Insurance Services, Inc. and the brokerage firm which directly negotiated the policy with CDI.

On the other hand, CDI submitted the affidavit of Mr. Jerry Wood, President and Chief Executive Officer of CDI, who was responsible to and in fact procured the insurance policy at issue. (Appendix No. 6.) Therein, Mr. Wood affirmatively stated that he has no recollection of any explanation or warning provided by the insurance brokers regarding the effect of a pollution damage exclusion and the resulting limitations or loop-holes in coverage for fortuitous or accidental events, nor specifically for tank truck accidents. Mr. Wood stated that it was and remains his expectation that the comprehensive general liability insurance coverage purchased would provide CDI with a defense and indemnification for the tank truck incident. Required to draw all inferences in favor of the non-moving party, **the District Court avoided the impact of Mr. Woods' positive and uncontroverted evidence on this issue-the very issue of reasonable expectations-by tossing out the whole interpretive scheme prescribed by the law of New Mexico.**

Finally, considering the historical intent and emergence of pollution exclusion clauses, which were introduced by the insurance industry to deal with and limit coverage for emerging environmental pollution claims arising from industrial activities[1], the need for consideration of the

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[1] *South Central Bell Telephone Co. v. Ka-Jon Food Stores*, 644 So.2d 357, *vacated and remanded on other grounds*, 644 So.2d 368 (1994); *Morton International Inc. v. General Accident Insurance Co. of America*, 134 N.J. 1, 629 A.2d 831 (N.J. 1993).

insured's reasonable expectations is all the more acute. Even the courts have had no little difficulty interpreting and applying pollution exclusion clauses, and no obvious organizing principle has emerged to distinguish cases finding pollution exclusions unambiguous when applied to the facts of an underlying claim, from those that have reached the opposite conclusion.[2] The facts underlying the present coverage dispute range far from the typical industrial emissions scenario, and instead involve the chance explosion of a tank truck not owned or operated by the insured, not on the premises of the insured, nor even in the service of the insured at the time of the casualty. CDI submits that its expectation of coverage under a general liability policy for such a fortuitous event is not subject to summary disposition, especially when considering the analytical and interpretative rules prescribed by the law of New Mexico.

On the basis of the evidence before the District Court, or more precisely the lack thereof, summary judgment as to Resure's defense and indemnity obligation to CDI was wholly inappropriate. More significantly, however, the District Court's refusal to apply the interpretive scheme prescribed by the Supreme Court of the State of New Mexico, and the District Court's implementation of unsupported limitations upon consideration of an insured's reasonable expectations, cannot withstand scrutiny, and must be reversed.

II. THE DISTRICT COURT IMPROPERLY DREW FACTUAL INFERENCES AGAINST THE NON-MOVANT, CDI

The District Court's grant of summary judgment was appropriate only if the record discloses "that there is no

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[2]*See, Red Panther Chemical Company v. Insurance Company of the State of Pennsylvania*, 43 F.3d 514, 518 (10th Cir. 1994) and cases cited therein.

genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The party seeking summary judgment bears the initial burden of identifying those portions of the pleadings and discovery on file, together with any affidavits, which it believes demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S. Ct. 2548, 2554, 91 L.Ed.2d 265 (1986). If the movant carries its burden, the burden shifts to the non-movant to show that summary judgment should not be granted. *Id.* at 324-25, 106 S. Ct. at 2553-54. In any event, **the court must draw all justifiable inferences in favor of the nonmoving party.** *Anderson v. Liberty Lobby, Inc.* 477 U.S. 242, 255, 106 S.Ct. 2505, 2513-14, 91 L.Ed.2d 202 (1986)(emphasis ours).

Resure would be entitled to summary judgment in this case **only** if it established **all facts** necessary to show that its "Absolute Pollution Exclusion" clause is effective to nullify coverage for the underlying claims. A particular factual matter is material to this coverage determination if resolution of that fact in favor of one party might affect the outcome of the suit under governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S. Ct.. 2505, 91 L. Ed. 2d 202 (1986). The law governing interpretaion of the policy under scrutiny is provided by the State of New Mexico.

As fully set forth above, "[e]xclusionary clauses in insurance policies are to be narrowly construed **with the reasonable expectations of the insured providing the basis for...analysis.**" *Allstate Ins. Co. v. Stone*, 116 N.M. 464, 467, 863 P.2d 1085, 1088 (1993), *citing Knowles v. United Servs. Auto. Ass'n, supra.* What were CDI's expectations of coverage relative to the tank truck explosion, and were those expectations reasonable?

CDI established, via the Affidavit of its President and Chief Executive Officer, Mr. Jerry Wood (Appendix No. 6), that CDI received no warning from Resure's producing broker that the policy would void coverage of liability claims arising from tank truck accidents. Mr. Wood, as his affidavit establishes, fully expected that insurance coverage would obtain for claims such as have arisen from the tank truck accident, which did not involve CDI's premises, equipment, products or chemicals.

The District Court rejected this factual showing, stating the following:

> Even if it is appropriate to apply the doctrine in certain business settings, it should not be applied here, since Jerry Wood, President and Chief Executive Officer [sic] of CDI since 1986, personally participated in procuring the policy issued by Resure to CDI.

(Appendix No. 2.) It appears the District Court disposed of CDI's factual showing by concocting certain inferences regarding the nature of the insurance transaction, and the relative sophistication of Mr. Wood *vis-a-vis* the scope and extent of the absolute pollution exclusion clause. On the foundation of these adverse inferences, the District Court apparently concluded that CDI's expectations of coverage for the tank truck incident were unreasonable.

Such adverse factual conclusions are, in the first instance, improper on summary judgment. Moreover, all fact questions are to be viewed in the light most favorable to the non-movant. *Anderson v. Liberty Lobby, Inc., supra; Hassan v. Lubbock Independent School District,* 55 F.3d 1075, 1078 (5th Cir.), *cert. denied,* -U.S.-, 116 S. Ct. 532, 133 L. Ed. 2d

438 (1995). Thus, any factual inferences regarding the degree of Mr. Wood's sophistication, particularly in light of his simple declaration that he expected coverage would obtain for the tank truck incident, must be drawn in CDI's favor. Likewise, any factual inferences respecting the content or "dynamics" of the insurance transaction, especially considering Mr. Wood's undisputed statement that no discussion of any kind was had relative to the alleged exclusion of coverage for all tank truck accidents, should have been drawn in CDI's favor. At the very least, further scrutiny of the transaction was required by the established law of this Honorable Court.

Directly contrary to this Honorable Court's admonition that a court considering summary judgment must draw all justifiable inferences in favor of the nonmoving party, *Anderson v. Liberty Lobby, Inc., supra*, the District Court crafted adverse factual inferences regarding the "dynamics" of the relevant insurance transaction, and rejected the undisputed facts set forth by CDI in responding to Resure's motion for summary judgment, in order to support its rejection of CDI's reasonable expectations of general liability coverage for the underlying tank truck explosion and its rejection of the prevailing law of New Mexico's high court. The reality is that the content of the insurance transaction, which must be explored under New Mexico's interpretive scheme, was and is not susceptible of summary adjudication under the facts set forth by Resure in its motion. The District Court's adverse application of factual inferences, contrary to the dictates of federal summary judgment standards in contravention of the mandates of applicable New Mexico law, placing the federal courts below, sitting in diversity, in direct conflict with New Mexico law, as enunciated by its Supreme Court, must be reversed.

CONCLUSION

Defendant-petitioner, Chemical Distributors, Inc., respectfully submits that the District Court's summary judgment in favor of Resure, Inc. directly conflicts with the basic tenets of Federalism which must be maintained in the exercise of diversity jurisdiction, and should be reversed. The District Court's refusal to apply the clear and well-settled law of the State of New Mexico, and its refusal to consider CDI's reasonable expectations of coverage in this scenario, all against the backdrop of the reigning uncertainty respecting the intent and extent of absolute pollution exclusions, was clearly improper and should be reversed. Further, the District Court's rejection of CDI's factual showing, by concocting unsupported and adverse factual inferences, was improper and requires reversal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that I have on this 22nd day of December, 1997, served the foregoing Petition for Writ of Certiorari on all counsel of record, by placing a copy of same in the United States Mail, properly addressed and first class postage prepaid, or by hand delivery, as follows:

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LAURENCE E. BEST

APPENDIX A

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

FILED
JAN 26

RESURE, INC.,	*	
Plaintiff	*	CIVIL ACTION NO.: 95-274-B-M2
VS.	*	
CHEMICAL DISTRIBUTORS, SAFEWAY TRANSPORTATION, INC., EDWARD BUGGAGE, SCOTT F. MCCANTS AND SAUL KIMBLE	*	JUDGE PARKER MAGISTRATE NOLAND
	*	
	*	

* * * * * * * * *

JUDGMENT

In accordance with this Court's Ruling on Plaintiff's Motion for Summary Judgment filed into the record on May 31, 1996.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Resure, Inc. has no obligation to defend or indemnify Chemical Distributors, Inc. under that certain

policy of general liability insurance issued by Resure, Inc. to Chemical Distributors, Inc., bearing policy number DOL-177523, in connection with any and all suits which have been or may be brought against Chemical Distributors, Inc. arising out of that certain explosion of a tanker truck owned by TMI Enterprise, Inc. in Port Allen, Louisiana, on or about July 16, 1993 (the "Explosion Incident").

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Resure, Inc. is entitled to reimbursement for any and all costs of defense, including attorney's fees (the "Costs of Defense"), it has or will have expended for the benefit of Chemical Distributors, Inc. in connection with the defense of the underlying property damage and personal injury suits brought against Chemical Distributors, Inc. arising out of the Explosion Incident, including without limitation:

a. Uniroyal Chemical Company, Inc. vs. Deltech Corporation, U.S. Comex Corporation, Safeway Transportation, Inc. and TMI Enterprise, Inc., Civil Action No. 93CV998-B-2, United States District Court, Middle District of Louisiana;

b. Edward Buggage and Scott F. McCants vs. TMI Enterprises, Inc., Safeway Transportation, Inc., Deltech, Inc., Uniroyal Chemical, Inc. Chemical Distributors, Inc. and Commerce and Industry Insurance Company, 18th Judicial District Court, parish of West Baton Rouge, State of Louisiana, Civil Action No. 26066, Division D;

c. Saul Kimble vs. Safeway Transportation, Inc., Deltech Corporation, U.S. Comex Corporation, TMI Enterprise, Inc. Paul Fireman, C.D.I. Inc., and

Commerce and Industry Insurance Company, 18th Judicial District Court, parish of West Baton Rouge, State of Louisiana, Civil Action No. 26065, Division C.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Resure, Inc. is entitled to legal interest at the Louisiana legal rate on all such Costs of Defense expended by Resure, Inc. from the date of each such expenditure until paid.

Baton Rouge, Louisiana, June 26, 1996

/s/ John V. Parker

JOHN V. PARKER, CHIEF JUDGE
MIDDLE DISTRICT OF LOUISIANA

Respectfully submitted,

/s/ Loree Peacock LeBoeuf

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Attorneys for Resure, Inc.

CERTIFICATE OF SERVICE

I do hereby certify that I have on this 24rd day of June, 1996, served a copy of the foregoing pleading on counsel for all parties to this proceeding, by mailing the same by United States mail, properly addressed, and first class postage prepaid.

/s/ Loree Peacock LeBoeuf

APPENDIX B
UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

FILED
MAY 31

RESURE, INC.	CIVIL ACTION
VERSUS	NUMBER 95-274
CHEMICAL DISTRIBUTORS, INC.; SAFEWAY TRANSPORTATION, INC.; EDWARD BUGGAGE; SCOTT F. MCCANTS; AND SAUL KIMBLE	

RULING ON PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

This matter is before the Court on a motion for summary judgment filed by the plaintiff, Resure, Inc. ("Resure, Inc."). For the reasons which follow, the motion is granted.

FACTS AND PROCEDURAL HISTORY

On July 16, 1993, a parked tanker truck exploded in Port Allen, Louisiana, destroying several nearby vehicles and releasing a plume of contaminants into the surrounding atmosphere. A chemical reaction inside the tank caused the explosion, The truck was owned by TMI Enterprise, Inc., and was, at the time of the explosion, leased to defendant Safeway Transportation, Inc. ("Safeway"). The truck had,

DKT & ENTERED
DATE 5/31/96
NOTICE MAILED TO: Hubbard, Best, LaFleur, Moore,
DATE 5/31/96 ByHj Barres, JVP RL

been previously leased to defendant Chemical Distributors, Inc. ("CDI"). The explosion was allegedly caused in part by CDI's failure to thoroughly clean the inside of the tank at the end of CDI's lease term.

As a result of the explosion, suits were filed in both state and federal court. At least two state court suits are pending in the Eighteenth Judicial District Court for the Parish of West Baton Rouge, Louisiana. Both of those suits seek damages for personal injuries suffered after being exposed to the released contaminants. Two federal court suits are pending in the Middle District of Louisiana. One of those suits seeks contribution for response costs incurred cleaning up the explosion site. The other suit is the one presently before the Court. In this suit, Resure, CDI's commercial general liability insurer, seeks a declaratory judgment that the facts of this case come within the policy's pollution exclusion clause and that Resure is therefore not liable on the policy. Jurisdiction is invoked under 28 U.S.C. § 1332. Named as defendants are CDI, Safeway, Edward Buggage, Scott McCants, and Saul Kimble. Buggage, McCants, and Kimble are plaintiffs in the state court suits and have all named CDI as a defendant in those suits. Safeway has filed a third party-complaint against CDI in the other federal court suit. It appears from the record that Resure has not been named as a defendant in any of these other lawsuits.

On October 31, 1995, Resure filed the motion for summary judgment now before the Court. CDI filed its opposition two days after the deadline for opposing the motion had passed, despite this Court having previously granted the defendants an extension of time in which to file oppositions. The other defendants filed oppositions adopting the arguments advanced by CDI. The Court will consider CDI's arguments despite CDI's failure to timely file its opposition.

SUMMARY JUDGMENT

Under Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment is proper when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.[1]

ANALYSIS

The parties generally agree as to the facts and circumstances surrounding the explosion. What is disputed is whether Louisiana or New Mexico law governs, and whether the pollution exclusion clause is so unambiguous as to make this case appropriate for summary judgment.

A. *Choice of Law*

Resure argues that New Mexico law should govern this dispute. In support, Resure points out that CDI is a New Mexico corportion, and that the insurance policy was negotiated and delivered in New Mexico. Resure then argues that "if the law of the place of 'accident' is applied to a multi-state trucking company [like CDI], neither it nor its insurer have any means of negotiating required coverage for the insured with any degree of certainty.[2] Resure also makes the related argument that the application of the law of the place of the accident could result in inconsistent results from state to state. The defendants do not argue that Louisiana law should

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[1] *See also Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 2552, 91 L. Ed. 2d 265 (1986); *Cormier v. Pennzoil Exploration & Prod. Co.*, 969 F.2d 1559, 1560 (5th Cir. 1992).

[2] Pl.'s Mem. In Supp. of Mot. for Summ. J. at 7.

govern this dispute, but instead argue that regardless of whose law applies, summary judgment is inappropriate.

Klaxon Co. v. Stentor Electric Manufacturing Co.[3] requires the Court to apply Louisiana's choice-of-laws provisions. Applying Louisiana Civil Code article 3515 and 3537, the Court finds that New Mexico law must govern this dispute. When confronted with similar cases, Louisiana courts consistently apply the law of the state in which the insurance policy was executed.[4]

B. *The Pollution Exclusion Clause*

The Resure policy insures against claims for "bodily injury" and "property damage." "Bodily injury" is defined as "bodily injury, sickness or disease sustained by any person." "Property damage" is defined as "physical injury to or destruction of tangible property . . . including the loss of use thereof . . . or loss of use of tangible property which has not been physically injured or destroyed."

The disputed clause in the insurance policy reads as follows:

> This insurance does not applly . . . to "bodily injury" or "property damage" (inclusing the loss of the use thereof) caused by, contributed to or arising out of the actual or threatened discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or

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[3] 313 U.S. 487, 496, 61 S. Ct. 1020, 1021-22, 85 L. Ed. 1477 (1941).

[5] *See Partin v. Dolby*, 652 So. 2d 670, 674 (La. App. 1st Cir. 1995); *Holcomb v. Universal Ins. Co.*, 640 So. 2d 718, 722 (La. App. 3d Cir.), *writ denied*, 644 So.2d 643 (1994); *Levy v. Jackson*, 6126 So. 2d 894, 897 (La. App. 4th Cir. 1993).

> gases, waste materials or other irritants into or upon the land the atmosphere or any course or body of water, whether above or below ground.
>
> It is understood and agreed that the intent and effect of this exclusion is to delete from any and all coverage afforded by this policy and [sic] claim, action, judgment, liability, settlement, defense or expense (including any loss, cost or expense arising out of any governmental direction or request that the "insured" test for, monitor, clean-up, remove, contain, treat, detoxify or neutralize pollutants) in any way arising out of such actual or threatened discharge, dispersal, release or escape, whether such results from the "insured" activities or the activities of others and weather [sic] or not such is sudden or gradual and whether or not such is accidental, intended, forseeable, expected, fortuitous or inevitable and wherever such occurs.

Resure argues that the clause is unambiguous and that its application to the facts is clear. The defendants do not argue that the language of the clause is ambiguous, nor do they argue that a literal reading of the clauses renders the policy inapplicable to the facts of this case. They instead argue that based on the history of pollution exclusion clauses, it is unclear whether this clause applies to these facts. The defendants contend that pollution exclusion clauses are generally directed at the insured's own polluting activities. They point out that the July 16 explosion did not result from CDI's own polluting activities, and thus conclude that it is unclear whether the clause applies in this case.

This argument is without merit. The second paragraph of the clause expressly states that this particular exclusion

applies regardless of whether the discharge results from the insured's activities or from the activities of others.[5] Turning to the individual claims levied against CDI, Buggage and McCants allege that "as a result of the explosion, [they] breathed in air contaminated with the chemicals in the trailer and sustained personal injury."[6] Similarly, Kimble alleges that he suffered respiratory ailments as a result of "the release of gases, fumes and chemicals which invaded his body."[7] These allegations clearly come within the policy exclusion for bodily injury caused by or arising out of the discharge, dispersal, release or escape of toxic chemicals into the atmosphere. Kimble also alleges he "further suffered damages to his motor vehicle,"[8] though it is unclear whether the damage was caused by the explosion itself or by the released pollutants. In either event, this claim clearly comes within the exclusion for property damage caused by or arising out of the discharge, dispersal, release or escape of toxic chemicals into the atmosphere.

In order to evaluate Safeway's third-party complaint filed against CDI in the other federal court lawsuit, it is necessary to consider the numerous theories of recovery

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[5] Also, as previously noted, related litigation is pending before this Court. The Court in that case has already found a similar pollution exclusion clause to be unambiguous and applicable regardless of the manner in which the accident arose. Uniroyal Chem.Co. v. Deltech Corp., No. 93-998 (M.D. La. Dec. 27, 1995) (granting the defendant insurer's motion for summary judgment). *See also Bituminous Casualty Corp. v. Kenworthy Oil Co.*, 912 F. Supp. 238, 240-41 (W.D. Tex. 1996).

[6] Pet. For Damages at 3, *Buggage v. TMI Enters., Inc.*, No 26066 (La. 18th J.D.C.).

[7] Pet. at 3, *Kimble v. Safeway Transp., Inc.*, No. 26065 (La. 18th J.D.C.).

[8] Pet. at 3, *Kimble v. Safeway Transp., Inc.*, No. 26065 (La. 18th J.D.C.).

asserted by Uniroyal against Safeway.[9] Without going into detail, the Court is satisfied that these various theories of recovery all come within the Resure policy pollution exclusion clause. The Court also notes that to the extent CDI is found liable for response costs incurred cleaning up the explosion site, those costs are likely not "bodily injury" or "property damage" within the meaning of the policy.[10]

The defendants next argue that summary judgment is inappropriate because Resure has failed to address the potential impact of New Mexico's doctrine of reasonable expectations. That doctrine holds that "if the language of the [insurance] policy is such that a layman could not understand its full impact, the policy [will] be interpreted in such a manner as to yield maximum protection consistent with policy language and the reasonable expectations of the

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[9] Uniroyal seeks compensatory damages from Safeway under the following theories of recovery: The Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C.A. § 9601-9675 (West 1995); The Louisiana Hazardous Materials Transportation and Motor Carrier Safety Law, La. R.S. 32:1501-:1521 (West 1989 & Supp. 1996); *negotiorum gestio;* unjust enrichment; general tort law; and general agency law. Uniroyal also seeks punitive damages under Louisiana Civil Code article 2315.3, although the policy contains a punitive damages exclusion clause that would likely absolve Resure of any liability for punitive damages, regardless of the effect of the polution exclusion clause.

[10] Also in the other federal court lawsuit, Union America has intervened as the insurer of Enercon Trucking, Inc. ("Enercon"), which owned seven trailer units that were destroyed by the explosion. Union America paid Enercon's claim, then intervened as Plaintiff and named CDI as a defendant. Although Union America is not a party to the case presently before the Court, the Court notes that Union America's claims woud certainly come within the Resure policy exclusion for property damage caused by or arising out of the discharge, dispersal, release or escape of toxic chemicals into the atmosphere.

insured.[11] The rationale for the doctrine is that "the insured most often is a layman, the average man or woman on the street, who is not a college graduate or a student of insurance law. . . . They cannot, ordinarily, read and understand the complex, complicated and intricate provisions of an insurance policy . . . .[12]

The Court finds that the doctrine of reasonable expectations plays no part in interpreting the pollution exclusion clause at issue. The doctrine is intended to protect unsophisticated laymen, and hence it probably has little application in the business insurance context. Even if it is appropriate to apply the doctrine in certain business settings, it should not be applied here, since Jerry Wood, President and Chief Executive Office of CDI since 1986, personally participated in procuring the policy issued by Resure to CDI. Finally, the doctrine should not be invoked to create an ambiguity in an otherwise unambiguous policy provision.[13]

The Court therefore finds that the facts of this case fall within the policy's pollution exclusion clause, and that Resure is entitled to summary judgment as a matter of fact and law.

C. *Reimbursement of Defense Costs*

After being informed of the first lawsuit filed against CDI, Resure retained an attorney to defend CDI's interests. However, Resure had serious doubts whether CDI was

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[11] *Davison v. Business Men's Assurance Co. of Am.*, 518 P.2d 776, 778 (N.M. 1974). *See also Pribble v. Aetna Life Ins. Co.*, 501 P.2d 255, 260 (N.M. 1972).

[12] *Read v. Western Farm Bureau Mut. Ins. Co.*, 563 P.2d 1162, 1166 (N.M. Ct. App. 1977).

[13] *See Davison*, 518 P.2d at 778-79.

entitled to coverage under the policy. Accordingly, in a letter dated September 9, 1994, Resure reserved all its rights under the policy, including its right to reimbursement of any costs of defense. Pursuant to that reservation, Resure now seeks reimbursement for its costs of defense, including all attorney fees paid by it. The defendants have not addressed this issue in their opposition memorandums.

Resure timely reserved its rights under the policy. That reservation specifically referred to the possibility that Resure might seek reimbursement for any and all costs of defense. There is nothing in the record to suggest CDI objected to the reservation. Accordingly, Resure is entitled to reimbursement for all costs of defense.

Therefore:

IT IS ORDERED that the plaintiff's motion for summary judgment be and it is hereby GRANTED.

Judgment shall be entered dismissing this suit with prejudice.

Baton Rouge, Louisiana, May 31, 1996.

/s/ John V. Parker

JOHN V. PARKER, CHIEF JUDGE
MIDDLE DISTRICT OF LOUISIANA

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 96-30773

FILED
MAY 08 1997

RESURE, INC.,

Plaintiff-Appellee,

versus

CHEMICAL DISTRIBUTORS, INC.,

Defendant-Appellant.

Appeal from the United States District Court
For the Middle District of Louisiana

(95-CV 274 B M2)

Before HIGGINBOTHAM, WIENER, and DENNIS, Circuit Judges.

PER CURIAM:

AFFIRMED. See Local Rule 47.6.*

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* Pursuant to Local Rule 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in Local Rule 47.5.4.

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 96-30773

FILED
SEP 23 1997

RESURE, INC.,

Plaintiff - Appellee

v.

CHEMICAL DISTRIBUTORS, INC.,

Defendant - Appellant

Appeal from the United States District Court for the Middle District of Louisiana, Baton Rouge

---

ON PETITION FOR REHEARING

Before HIGGINBOTHAM, WIENER, and DENNIS, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above case is *denied*.

ENTERED FOR THE COURT:

/s/ James L. Dennis
United States Circuit Judge

APPENDIX E

ENDORSEMENT #3

This endorsement effective 5-16-93 a.m. and, forms a part of policy No. DOL-177523 issued to CHEMICAL DISTRIBUTORS, INC.

ABSOLUTE POLLUTION EXCLUSION

Exclusion (f) is deleted from form L6395A and is replaced by the following:

(f) to "bodily injury" or "property damage" (including the loss of the use thereof) caused by, contributed to or arising out of the actual or threatened discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants into or upon the land the atmosphere or any course or body of water, whether above or below ground.

It is understood and agreed that the intent and effect of this exclusion is to delete from any and all coverage afforded by this policy and claim, action, judgment, liability, settlement, defense or expense (including any loss, cost or expense arising out of any governmental direction or request that the 'insured' test for, monitor, clean-up, remove, contain, treat, detoxitfy or neutralize pollutants) in any way arising out of such actual or threatened discharge, dispersal, release or escape, whether such results from the 'insured' activities or the activities of others and weather or not such is sudden or gradual and whether or not such is accidental, intended, forseable, expected, fortuitous or inevitable and wherever such occurs.

(signed)

Authorized Representative

APPENDIX F

STATE OF NEW MEXICO

COUNTY OF (SAN JUAN)

BEFORE ME, the undersigned authority, personally came and appeared:

JERRY WOOD

who, after being duly sworn, did depose and state that:

1. He is currently employed by Chemical Distributors, Inc., in the capacity of President and Chief Executive Officer, and has been employed in that capacity since 19(86);

2. In his capacity as President and Chief Executive Officer, he is responsible for procuring liability insurance coverage for Chemical Distributors, Inc.;

3. He personally participated in procuring the comprehensive general liability insurance coverage ultimately issued to Chemical Distributors, Inc. by Resure, Inc. under Policy No. DOL-177523;

4. He has no recollection of receiving any explanation or warning, in connection with procuring the aforesaid comprehensive general liability insurance coverage, regarding the effect of a pollution damage exclusion upon coverage for liability arising from fortuitous or accidental events;

5. He has no recollection of receiving any explanation of warning, in connection with procuring the aforesaid comprehensive general liability insurance coverage, regarding the effect of a pollution damage exclusion upon coverage for liability arising from tank truck accidents;

6. He expected that the comprehensive general liability insurance coverage ultimately issued to Chemical Distributors, Inc. by Resure, Inc., under Policy No. DOL-177523, would apply to claims arising from the tank truck accident of July 16, 1993.

7. All of the above is true and correct to the best of his knowledge, information and belief.

(Signed) _____
JERRY WOOD

Sworn to and subscribed before
me, Notary Public, this (26th)
day of December, 1995

(Signed) _____
NOTARY PUBLIC

Name (Tina Smith)
My Commission Expires (7/27/96)

FILED
MAR 11 1998
OFFICE OF THE CLERK

No. 96-1142

In The

Supreme Court of the United States

October Term, 1997

CHEMICAL DISTRIBUTORS, INC.,

Petitioner,

vs.

RESURE, INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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Lutz Appellate Services, inc.

PARTIES TO THE PROCEEDING

The petition accurately lists the parties to the proceeding, except that in paragraph 2 of the List of Parties and Persons, the last name of Loree Peacock LeBoeuf is misspelled.

Talon Re Holdings, Inc. is the parent company of respondent Resure, Inc. There are no nonwholly owned subsidiaries of respondent Resure, Inc.

TABLE OF CONTENTS

	Page
Parties to the Proceeding	i
Table of Contents	ii
Table of Citations	iii
Reference to Official/Unofficial Reports	1
Statement of Jurisdiction	1
Statement of Issue Presented	1
Statement of the Case	1
Argument	2
I. The District Court Properly Rejected Application Of The Reasonable Expectations Doctrine.	2
II. The *Barth* Decision Is Not On Point.	4
III. CDI Does Not Dispute That The District Court And The United States Court Of Appeal For The Fifth Circuit Found The "Absolute Pollution Exclusion" In This Case To Be Clear And Unambiguous.	7
IV. There Are No "Compelling Reasons" For Granting The Writ.	8
Conclusion	9

Contents

TABLE OF CITATIONS

Page

Cases Cited:

Ayers v. Pastime Amusement Co., 283 F. Supp. 773 (D.C. S.C. 1968) 4

Barth v. Coleman, 878 P.2d 319 (N.M. 1994) 4, 5

Celotex Corp. v. Catrett, 477 U.S. 317 (1986) 3

Davison v. Business Men's Assurance Co. of Am., 85 N.M. 796, 518 P.2d 776 (1974) 2

Joslyn Corp. v. T.L. James & Co., Inc., 696 F. Supp. 222 (W.D. La. 1988), *aff'd*, 893 F.2d 80 (5th Cir. 1990), *cert. denied*, 498 U.S. 1108 (1991) 3

Mack v. Great Atlantic and Pacific Tea Co., Inc., 871 F.2d 179 (1st Cir. 1989) 4

Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986) 3

Medina-Munoz v. R.J. Reynolds Tobacco Co., 896 F.2d 5 (1st Cir. 1990) 4

Mesa Oil, Inc. v. Insurance Co. of N. Am., 123 F.3d 1333 (10th Cir. 1997) 5, 6, 7

Contents

Page

Rule Cited:

Federal Rules of Civil Procedure Rule 56 3

REFERENCE TO OFFICIAL/UNOFFICIAL REPORTS

The District Court opinion is a published decision entitled "*Resure, Inc. v. Chemical Distributors, Inc.*, 927 F. Supp. 190 (M.D. La. 1996)." The United States Court of Appeals, Fifth Circuit decision is also a published decision, without opinion, entitled "*Resure, Inc. v. Chemical Distributors, Inc.*, 114 F.3d 1184 (5th Cir. 1997)."

STATEMENT OF JURISDICTION

Respondent Resure adopts the "Statement of Jurisdiction" submitted by Petitioner CDI as its own.

STATEMENT OF ISSUE PRESENTED

Under New Mexico law, where an insurance policy is clear and unambiguous and there is no evidence in the record to support an expectation of coverage contrary to that clear and unambiguous language, must the court apply the reasonable expectations doctrine?

STATEMENT OF THE CASE

Respondent Resure adopts the Statement of the Case by CDI except that Resure disputes (1) CDI's statement that the District Court explicitly refused to consider CDI's "reasonable expectations"; (2) CDI's statement that the District Court crafted "limitations upon application of the doctrine of reasonable expectations . . ."; and (3) CDI's statement that the District Court concocted factual inferences.

ARGUMENT

I.

THE DISTRICT COURT PROPERLY REJECTED APPLICATION OF THE REASONABLE EXPECTATIONS DOCTRINE.

Evidence of the "dynamics" of the procurement of the Resure policy was before the District Court. That evidence, the Affidavit of Jerry Wood, President and Chief Executive Officer of CDI, was introduced by CDI. The Wood affidavit explained his personal, first-hand involvement in the procurement of the Resure policy. Nowhere in that affidavit does he even suggest that he was misled, duped, or the victim of a mistake. Faced with this admission of record, the District Court could not conclude that the reasonable expectations doctrine, a remedial doctrine invented to guard against unequal bargaining power involving an unsophisticated layman, should apply to the President of a multi-state chemical distribution company who personally negotiated an insurance policy that excludes damages arising from the release of pollution. The reasonable expectations doctrine has its limits and should not be invoked to create an ambiguity in an otherwise unambiguous policy provision.[1]

The record is devoid of any evidence that Jerry Wood requested coverage for damages arising from the release of hazardous chemicals into the atmosphere. The District Court was simply incredulous that the president of a company, christened "Chemical Distributors, Inc.", was caught unawares when Resure pointed out later that the policy he negotiated contained an exclusion for damages arising from the release of ***chemicals*** into the atmosphere. The "Reasonable Expectations

1. *Davison v. Business Men's Assurance Co. of Am.*, 85 N.M. 796, 518 P.2d 776, 778-79 (1974).

Doctrine" is not a get out of jail free card. And, whatever Mr. Wood may claim to have expected, the District Court justifiably found that a claimed "expectation" of coverage in the instant case was *not* reasonable.

Notably, this case was decided by the District Court on a motion for summary judgment. Rule 56 of the Federal Rules of Civil Procedure provides in pertinent part that:

> The judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Fed. Rule Civ. Proc. 56 (West 1997). In applying this federal standard, this Court has emphasized that summary judgment is not a disfavored procedural shortcut. Rather, summary judgment secures the just, speedy and inexpensive determination of a claim.[2] This Court has also ruled that if the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial.[3] Even if evidence presented by the non-moving party supports a claim that a genuine issue of material fact exists, summary judgment may still be granted if the evidence is merely colorable or not significantly probative.[4]

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2. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

3. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

4. *Joslyn Corp. v. T.L. James & Co., Inc.*, 696 F. Supp. 222, 232 (W.D. La. 1988), *aff'd*, 893 F.2d 80 (5th Cir. 1990), *cert. denied*, 498 U.S. 1108 (1991).

As one court has held, "[a] party may not escape summary judgment on the mere hope that something will turn up at the trial."[5] Moreover, "[t]he evidence illustrating the factual controversy cannot be conjectural or problematic. . . ."[6] CDI submitted Mr. Wood's affidavit as evidence of its "reasonable expectation" of coverage. Mr. Wood's affidavit is devoid of any allegation as to why he had an expectation of coverage for an event that was excluded from coverage by an undisputedly clear and unambiguous "absolute pollution exclusion." CDI, as the non-moving party, has an obligation to come forward with any facts to support its affirmative defenses. CDI failed to do so. Accordingly, under the federal standard for summary judgment outlined above, this Court should agree that the device of summary judgment was perfectly suited to the instant matter and deny the petitioner's application for a writ of certiorari.

II.

THE *BARTH* DECISION IS NOT ON POINT.

The case of *Barth v. Coleman*,[7] upon which CDI relies almost exclusively, is clearly distinguishable. In *Barth*, the underlying claim arose out of a barroom fist-fight. The premises liability policy contained an assault and battery exclusion although the owner of the barroom testified that he had specifically requested insurance coverage for assault and battery claims. In addition, because Coleman [the insured] did not

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5. *Ayers v. Pastime Amusement Co.*, 283 F. Supp. 773, 793 (D.C. S.C. 1968).

6. *Medina-Munoz v. R.J. Reynolds Tobacco Co.*, 896 F.2d 5, 8 (1st Cir. 1990) (*quoting Mack v. Great Atlantic and Pacific Tea Co., Inc.*, 871 F.2d 179, 181 (1st Cir. 1989)).

7. 878 P.2d 319 (N.M. 1994).

receive a copy of the policy prior to the fight, he had no notice that the policy contained an assault and battery exclusion. Accordingly, the court properly held that Coleman had a reasonable expectation that the policy would conform to the coverage requested.[8]

Not one of the *Barth* factors are present in the instant litigation. The President and Chief Executive Officer of CDI, Jerry Wood, personally participated in procuring the policy at issue. Nowhere in Mr. Wood's affidavit does it state that he requested coverage for damages arising out of pollution or that he was misled in any respect. Furthermore, Mr. Wood had notice of the policy at issue, which was delivered in May of 1993, two months prior to the incident in question. Even a cursory review of the policy clearly evidences that Endorsement No. 3 was very prominently displayed at the forefront of the policy. This is not some exclusion that CDI can claim was hidden away in tiny print at the back of the policy.

Resure does not have the burden of proving a negative — that it did not mislead CDI. Rather, the introduction of the policy with its exclusionary language shifts the burden to CDI to show inappropriate conduct or to demonstrate a factual basis for "reasonable expectations" that are directly counter to the clear and unambiguous language of the policy. This CDI did not and cannot do. Absent evidence of improper conduct by Resure, as a matter of law, it is not "reasonable" for Mr. Wood to claim he "expected" coverage for damages caused by pollution when the "Absolute Pollution Exclusion" in the policy specifically provides otherwise.

The recent case of *Mesa Oil, Inc. v. Insurance Co. of N. Am.*[9], is instructive. There, an insured oil recycler, Mesa Oil,

8. *Id.* at 324.

9. 123 F.3d 1333 (10th Cir. 1997).

brought a state court action against its general liability insurer seeking coverage for a suit related to an environmental cleanup of a Superfund site. The insurer removed the case to federal court and moved for summary judgment based upon the pollution exclusion.[10] Applying New Mexico law, the trial court and the Court of Appeals for the Tenth Circuit held that the pollution exclusion excluded coverage.[11] Mesa Oil appealed and argued several points, one of which was that the district court erred "in failing to give adequate consideration to Mesa's reasonable expectations; and in failing to apply New Mexico's rules of interpreting insurance policies."[12] In affirming the award of summary judgment, the appellate court noted the following:

> The New Mexico Supreme Court has flatly stated that it will enforce the plain language of insurance contracts. Mesa relies on a doctrine under which New Mexico courts enforce the "reasonable expectations of the insured" to resolve ambiguities in insurance contracts. **However, the insured's expectations only come into play to resolve ambiguities once the court determines, based on the contract language together with any extrinsic evidence offered by the parties, that the contract is ambiguous.** In this case, the plain language of the pollution exclusion precludes coverage, and the district court determined that the extrinsic evidence offered by Mesa did not create any ambiguity. Thus, there was no need to resolve any ambiguity in favor of the insured. **Here, if Mesa did harbor expectations that it was insured for the ongoing oil spillage at Ekotek's**

10. *Id.* at 1334-35.

11. *Id.* at 1335.

12. *Id.*

> **facility in Utah, such an expectation would not have been a reasonable one.**[13]

In the case at hand, the District Court found that the language of the absolute pollution was clear and ambiguous. This fact is not disputed by CDI. The District Court examined in detail the evidence offered by CDI, specifically, the Wood affidavit, and found that the Wood affidavit did not create any ambiguity. Thus, there was no need to resolve any ambiguity in favor of CDI. Like the insured in *Mesa Oil*, if CDI did harbor expectations, those expectations were not reasonable based upon the clear wording of the policy.

III.

CDI DOES NOT DISPUTE THAT THE DISTRICT COURT AND THE UNITED STATES COURT OF APPEAL FOR THE FIFTH CIRCUIT FOUND THE "ABSOLUTE POLLUTION EXCLUSION" IN THIS CASE TO BE CLEAR AND UNAMBIGUOUS.

By its very terms, the absolute pollution exclusion bars coverage for damages caused by toxic chemicals, no matter the cause of the chemical release and no matter the circumstances giving rise to such release. The claims asserted in the underlying lawsuits explicitly allege a pollution event encompassed within the language of the pollution exclusion; therefore, there is no coverage under the liability policy issued and no further inquiry is necessary.

It is irrelevant that the truck explosion occurred while the truck was in the service of some company other than CDI, that the explosion occurred on premises owned or operated by some

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13. *Id.* at 1340 (emphasis supplied).

entity other than CDI, and that the cause of the explosion may have been due to the fault of an entity other than CDI. The trial court aptly observed that

> [t]he second paragraph of the [absolute pollution exclusion] expressly states that this particular exclusion applies regardless of whether the discharge results from the insured's activities or from the activities of others.

No further inquiry is needed.

IV.

THERE ARE NO "COMPELLING REASONS" FOR GRANTING THE WRIT.

The United States Supreme Court Rules provide that "[a] review on a writ of certiorari is not a matter or right, but of judicial discretion." Furthermore, "[a] petition for a writ of certiorari will be granted only for compelling reasons." No "compelling reasons" are present in this case. This is not a decision on an important matter in conflict with the decision of another United States Court of Appeals. This is not a decision that decides an important federal question in conflict with a state court of last resort. This is not a decision that has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of the Supreme Court's power of supervision. This is not a decision of a state court deciding an important federal question in a way that conflicts with the decision of another state court or of a United States Court of Appeals. Nor is this a decision on an important question of federal law which has not been, but should be, settled by the Supreme Court. Rather, four federal judges have exhaustively considered this case and concluded that (1) under

New Mexico law, an insurance policy that excludes coverage for damages caused by pollution means what it says; and (2) it is unreasonable for one to expect coverage when the policy clearly and unambiguously says there is none and there is no evidence in the record to support the insured's claim of an expectation of coverage notwithstanding the clear and unambiguous language of the policy.

CONCLUSION

For the reasons given above, the petition of CDI is due to be denied.

Respectfully submitted,

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